IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1033/48

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JOHN F. DAVIS, CLERK

MINNIE E. NASH,

Petitioner,

vs.

FLORIDA INDUSTRIAL COMMISSION, THE STANLEY WORKS and STANLEY BUILDING SPECIALTIES,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1032

MINNIE E. NASH,

Petitioner,

vs.

FLORIDA INDUSTRIAL COMMISSION, THE STANLEY WORKS and STANLEY BUILDING SPECIALTIES,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Respondent Florida Industrial Commission has attacked the jurisdiction of this Court to review the decision of the District Court of Appeal of Florida, Third District,

herein, upon two grounds: (a) no petition for rehearing was filed in the District Court of Appeal below; (b) no suggestion was made to the District Court of Appeal below that that Court certify that it had passed upon a question of great public interest.

The respondent Employer in its Brief in Opposition filed herein, concurs in ground (b) above, makes no mention of ground (a), and further suggests that some review by appeal was available to petitioner in the Florida Supreme Court, a suggestion correctly rejected by respondent Florida Industrial Commission (Br. for Resp. Fla. Ind. Comm., pp. 9-10) by its express concession that the Florida Supreme Court had no appellate jurisdiction in this case.

Petitioner submits that these "scatter shot" attacks upon the jurisdiction of this Court, based upon purported review being available in the Florida Supreme Court, are completely without merit under the applicable State law and practice, and the practice and procedure of this Court. As stated in the petition, there was no jurisdiction by certiorari or appeal in the Florida Supreme Court from the simple *per curiam* denial of certiorari by the District Court of Appeal entered herein without opinion. Petitioner would have assumed that these jurisdictional matters were sufficiently well settled so as not to have provoked the lengthy and wholly erroneous dissertations on jurisdiction filed herein by respondents. Further, petitioner's citation of the very recent case of *Adderley v. State of Florida*, 382 U.S. 1023, 87 S. Ct. 242 (November 14, 1966) (Pet. for Cert., p. 11) — a case arising from a similar *per curiam* denial of certiorari by the District Court of Appeal of Florida, First District, 175 So. 2d 249, wherein procedurally identical constitutional issues were raised and

where the Attorney General of the State of Florida and this Court, 87 S. Ct. at 244, recognized that no further review was available in the Florida Supreme Court — would have seemed an adequate, squarely-in-point precedent.

Reply to the respondents' jurisdictional assertions will be made, however, in order to dispel any doubt which may have been cast upon the jurisdiction of this Court to review this case at this time.

We deal first with the contention that the Florida Supreme Court has jurisdiction by appeal to consider *per curiam* denials of certiorari by the Florida District Courts of Appeal. *Callendar v. State*, 181 So. 2d 529 (Fla. Sup. Ct. 1966), followed by *Callendar v. Florida*, 383 U.S. 270 (1966), fully answer such contentions. We append the full opinion of the Supreme Court of Florida in *Callendar* to this reply, *infra* at Appendix pp. 1-7, and respectfully submit that this case is squarely controlling. It is obvious that *Adderley v. State of Florida, supra*, was decided in full recognition of *Callendar*, and respondent employer's assertions as to jurisdiction in the Supreme Court of Florida by appeal or otherwise are completely without merit.

Secondly, this Court's decisions in *Southern R. Co. v. Clift*, 260 U.S. 316 (1922), and *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548 (1945), provide a complete and categorical answer to Respondent Florida Industrial Commission's ground (a) above, respecting the finality of a state court judgment in the absence of a petition for rehearing. Such judgments become final on the day that they are rendered, and no petition for rehearing is required. See also: Wolfson and Kurland, *Robertson*

& Kirkham, Jurisdiction of the Supreme Court of the United States, Secs. 43, 44, pp. 75-76; Stern and Gressman, *Supreme Court Practice* (3rd Ed. 1962), Sec. 3-19 pp. 85-86.

As for ground (b) above, petitioner obviously agrees with respondents (for the reasons stated in her petition) that the District Court of Appeal below did pass upon a question of great public interest, and one which affects every employee in the State of Florida, in its *per curiam* denial of certiorari. The question here, however, is whether the filing of a "suggestion" with the District Court of Appeal that a certificate of great public interest be issued is a jurisdictional prerequisite to review in this Court, in the absence of which a *per curiam* decision of a Florida District Court of Appeal may not be considered a decision " . . . by the highest Court of a State in which a decision could be had." . . . 28 U.S.C. §1257.

Petitioner knows of no other case on certiorari or appeal to this Court from a Florida District Court of Appeal in which a similar contention has been made, and for good reason. The case of *Whitaker v. Jacksonville Expressway Authority*, 131 So. 2d 22 (1st D.C.A. Fla. 1961), provides the following with respect to the procedural step which respondents desire to have this Court hold a "condition precedent" (Br. of Resp. Employee, p. 13) to its review:

> "Inherent in every decision rendered by a District Court of Appeal is the implication, unless otherwise stated or contrary action taken, that it *does not* pass upon a question of great public interest; and when the labor of the court has term-

inated with its final decision and the issuance of its mandate thereon, it no longer has jurisdiction to enter a certificate of the character under discussion.

"* * *

"Since the right of review does not lie from a failure or refusal of a District Court of Appeal to certify any decision rendered by it as one that passes upon a question of great public interest, a pleading of the character under discussion is not a motion in the strict legal sense. It has no efficiency other than to invite the court's attention to the factors which the pleader believes to be important in *suggesting* that the decision be certified as passing upon a question of great public interest. At this juncture we wish to observe that it is not amiss and that this court will welcome the filing by any interested person, at any time prior to the expiration of the period of time allowed for filing of a petition for rehearing, of a suggestion to that effect, fortifying it with the factors that make it so; bearing in mind that such pleading has no legal effect.

"* * *

"In summary, we hold (1) that a party litigant is not entitled as a matter of right to have an order entered by this court disposing of any pleading the purpose of which is to cast on this court the duty to certify one of its decisions as one that passes upon a question of great public interest; (2) that at any time prior to expira-

> tion of the time allowed for filing a petition for rehearing any interested person may file in a pending cause a suggestion that the decision therein be certified as aforesaid, stating therein the factors upon which such suggestion is predicated; (3) that no formal order is necessary to dispose of such suggestion; (4) that any certificate by the court to the effect that a decision passes upon a question of great public interest shall in all cases be upon the court's own motion." 131 So. 2d at 23, 24. (Emphasis in the original).

The nature of the document or "suggestion" which respondent asserts is a jurisdictional prerequisite to review in this Court can easily be seen from the foregoing. A pleading to the lower appellate court of "* * * no legal effect * * *," 31 So. 2d at 24, for the disposition of which " * * * no formal order is necessary * * *," *Ibid*, is not and cannot be jurisdictional in this Court. Obviously, and as pointed out in *Whitaker*, this procedure is not only within the completely non-reviewable discretion of the District Court of Appeal, but also such certificates are issued only upon " * * * the court's own motion" and are completely an internal matter for the District Court of Appeal to decide in ruling on the case. Thus it can be seen that a "suggestion" is not in any sense a matter of invoking the discretionary review of a higher court, but rather a plea of no legal significance that the lower appellate court decide the case in a particular way. In practice, the District Courts of Appeal usually make such certification on their own initiative in their initial opinion deciding a case. *E.g.*, *Hines v. State*, 186 So. 2d 820 (1st

D.C.A. Fla. 1966); *McCray v. State*, 181 So. 2d 729 (1st D.C.A. Fla. 1966).*

Nothing in any of the cases cited by respondents is to the contrary. The opinion of the Florida Supreme Court in *Dresner v. City of Tallahassee*, 164 So. 2d 208 (Fla. 1964), cert. dismissed, 378 U.S. 539, makes no mention whatever of the certification of public importance procedure, and the language quoted by Respondent Florida Industrial Commission therefrom (Br., pp. 8-9) is expressly limited to the Florida Supreme Court's "direct conflict" certiorari jurisdiction. See Article V, Section 4(2), Florida Constitution.

No contention has been or can be made by respondents that any such "conflict" certiorari jurisdiction was here present in the Florida Supreme Court for as respondents correctly point out (Br. of Resp. Fla. Ind. Comm., p. 13; Br. of Resp. Employer, p. 20), the District Courts of Appeal of Florida are unanimous in denying unemployment compensation benefits to any unemployed person who has filed an unfair labor practice charge with the National Labor Relations Board against his employer. *Meyer v. Florida Industrial Commission*, 117 So. 2d 216 (2d D.C.A. Fla. 1959); *Post-Times Co. v. Turner*, 123 So. 2d 359 (1st D.C.A. Fla. 1960); *Gore v. Florida Industrial Commission*, 181 So. 2d 233 (3rd D.C.A. Fla. 1965). This unanimity clearly precludes any suggestion that "direct conflict" certiorari jurisdiction was present in the Florida Supreme Court.

*It would obviously be a puzzling contradiction for a court, on the one hand, to decide a case by a *per curiam* order without any opinion or discussion and, on the other hand, certify the case as one involving a question of great public interest. Petitioner knows of no instance where any District Court of Appeal of Florida has so acted.

The Florida Supreme Court in the two cases exhaustively considering its jurisdiction and that of the District Courts of Appeal with regard to the jurisdiction of this Court, *Dresner v. Tallahassee, supra,* and *Callendar v. State, supra,* has never even intimated that a suggestion to the District Court of Appeal for certification of great public interest was essential to the finality of a District Court of Appeal judgment prior to review by this Court.

Once past the finality question, Respondent Florida Industrial Commission concedes that the constitutional issues advanced in our petition are squarely presented. Thus, its brief (pp. 4-5) poses as the second "question presented", the following:

> "Under Article VI, clause 2, and the 14th Amendment, Section 1, United States Constitution, may a state disqualify a citizen of the United States from unemployment compensation benefits *solely* because that citizen has filed an unfair labor practice charge with the National Labor Relations Board . . . *such disqualification to begin on the date the unfair labor practice charge is filed and to continue for so long as it remains pending before the National Labor Relations Board?*" (Emphasis added)

Respondent employers, however, suggest in *their* brief (pp. 19,23) that the disqualification was not for filing the charge, but rather because of an underlying labor dispute reflected by the filing of the charge. This suggestion is untenable. As shown above, the Commission which ren-

dered the decision *concedes* that its decision was based "solely" on the filing of the charge. Moreover, the decision itself is not subject to the interpretation advanced by the employers. Petitioner contended in her charge to the NLRB that the *entire* period of her layoff was unlawful, yet the Commission awarded her unemployment compensation for the period of the layoff preceding the filing of the charge. It is thus clear beyond dispute that it was the *charge*, not the underlying events, which the Commission held to be disqualifying. As its opinion made clear:

> "*These charges* being filed and unresolved and pending as of the date appellant returned to work *constitute a labor dispute* in active progress at the premises at which she was last employed between claimant and the employer." (R. 33) (Emphasis added)

Respondent employers also suggest (p. 23) that petitioner is adequately protected because the NLRB has power to award her back pay. This contention, too, is fallacious. *If the NLRB decides favorably to petitioner*, it is true that she will receive back pay (and any unemployment compensation already received can be recouped by the State, *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951)). *But if the NLRB decides favorably to the employer*, i.e. finds that the layoff was indeed for economic reasons, petitioner will have suffered a grievously unjust injury. For then, under the decision below, she would receive no compensation from any source, whereas if she had not filed the charge she would have received unemployment compensation. Plainly, this is the imposition of a penalty by the State for filing a charge with the NLRB, violative of both

the supremacy and "privileges and immunities" clauses of the federal Constitution.

Petitioner submits that the Court below did in fact pass upon a question of great public interest and importance as now underscored and "certified" by respondents; that this Court has jurisdiction to consider the question; that petitioner was disqualified from unemployment compensation benefits solely because she filed an unfair labor practice charge with the National Labor Relations Board; that such disqualification is the imposition of a penalty which violates Article VI, Clause 2, and the 14th Amendment, Section 1, United States Constitution; and petitioner respectfully urges this Court to consider the question by granting the petition for certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply To Respondents' Briefs In Opposition To The Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Third District, was mailed airmail, postage prepaid, to Patrick H. Mears, Esq., General Counsel, Caldwell Building, Tallahassee, Florida, and by regular mail, postage prepaid, to Lawrence Kanzer, Esq., Room 161, State Office Building, 1350 N. W. 12th Avenue, Miami, Florida, Attorneys for Respondent, Florida Industrial Commission, and to W. Reynolds Allen and Glenn L. Greene, Jr., Esqs., Fowler, White, Collins, Gillen, Humkey & Trenam, 501 City National Bank Building, Miami, Florida 33130, Attorneys for Respondent, The Stanley Works and Stanley Building Specialties, this 3 day of ~~March~~ April, 1967.

Of Counsel